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## The Utility and Limits of Canons of Construction in Public International Law

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# **The Utility and Limits of Canons of Construction in Public International Law**

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BETWEEN THE LINES OF THE VIENNA CONVENTION: CANONS OF CONSTRUCTION AND  
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Kluwer)

## **I. Introduction**

Controversy over the utility and limits of canons of legal interpretation (or construction) has bedeviled the field of jurisprudence since ancient times, when such canons first emerged.<sup>1</sup> Recapitulating that intellectual history falls well outside the scope of this chapter, but recognizing its existence highlights a simple point: the utility of canons of construction when interpreting legal text, including with respect to treaties, is not a new topic. Indeed, it has deep-seated jurisprudential strands that date back centuries.

This chapter explores the utility and limits of canons of construction. While the canons of construction are relevant to any decision-maker or observer in the field of international law seeking to interpret a treaty, this chapter will focus on the utility and limits of such canons in the context of international adjudication; that is, their utility and limits for litigators and judges. Further, in exploring utility and limits, this chapter will focus on lessons that might be learned from jurisprudential developments in U.S. law over the past century concerning the use of canons of construction when interpreting U.S. statutes. In doing so, the chapter draws upon developments relating to several schools of American jurisprudence, beginning with legal formalism.

## **II. Utility and Limits: Legal Formalism**

Legal formalism in American jurisprudence is commonly understood as maintaining that adjudication entails the application of clear, consistent and comprehensive legal rules to a set of

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<sup>1</sup> For an intellectual history of the canons of construction from ancient times to the present, see DAVID J. BEDERMAN, CLASSICAL CANONS: RHETORIC, CLASSICISM AND TREATY INTERPRETATION (2001).

facts.<sup>2</sup> According to the formalist, these rules have an underlying and straightforward logic; with hard work, litigators and judges – like scientists in their domain – can discover and apply the proper rule in any given case to reach the correct outcome. Indeed, by studying carefully such rules and principles, a single and determinate system can be revealed, allowing an almost mechanical application of the law to facts (“almost” because a particular rule may have a certain porosity or “open texture” to its meaning; even then, the system provides determinate guidance).

Under this theory, the canons of construction constitute neutral rules. If a canon is properly identified and applied in any given case, it assists the decision-maker in reaching the correct conclusion. The canon’s utility lies in its ability to distill, in a simple formula, a piece of logic or wisdom, one that is universally true and that forms a part of the fabric of the international legal system. Much as the transitive property of equality (if  $A = B$  and  $B = C$  then  $A = C$ ) guides the mathematician or physicist, the legal canons of construction guide the litigator and judge in reaching a correct result.

Though initially developed in a context other than international law, these canons were known to and used by early writers on international law. Indeed, Grotius drew upon Greek and Roman jurisprudence to develop detailed canons of interpretation,<sup>3</sup> which were later developed further by Samuel Pufendorf,<sup>4</sup> and the positivists who succeeded them, notably Emmerich de Vattel.<sup>5</sup> Such writers, in turn, heavily influenced Sir Robert Phillimore’s important mid-eighteenth-century treatise,<sup>6</sup> which closely analyzed the subject of treaty interpretation and expounded on detailed canons of construction, serving as a key foil for subsequent treatises on the law of treaties.<sup>7</sup>

As was the case in national legal systems, when international arbitral tribunals and then courts began to emerge in the late nineteenth and early twentieth century, they often invoked canons of construction in the course of deciding cases. When doing so, they seemed to view the canons and other general principles as automatically and neutrally allowing the case to reach the “correct” result.<sup>8</sup> Today most international lawyers approach international law like that of the

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<sup>2</sup> For legal formalism in American jurisprudence, *see generally* T. C. Grey, *Langdell’s Orthodoxy*, 45 PITTSBURGH L. REV. 3 (1983); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 511, 539 (1988); Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111 (2010).

<sup>3</sup> *See* 2 HUGO GROTIIUS, *DE JURE BELLI AC PACIS* ch. 16 (F.W. Kelsey trans. 1925).

<sup>4</sup> 5 SAMUEL VON PUFENDORF, *LAW OF NATURE AND NATIONS* ch. XII (C.H. Oldfather & W.A. Oldfather trans. 1934).

<sup>5</sup> 2 EMMERICH DE VATTEL, *THE LAW OF NATIONS* § 263 (Charles G. Fenwich trans. 1916).

<sup>6</sup> *See* SIR ROBERT PHILLIMORE, *COMMENTARIES UPON INTERNATIONAL LAW* (T. & J.W. Johnson, 1854).

<sup>7</sup> Charles Cheney Hyde, *Concerning the Interpretation of Treaties*, 3 AM. J. INT’L L. (1909); TSUNE-CHI YÜ, *THE INTERPRETATION OF TREATIES* (1927); L. Ehrlich, *L’Interprétation des Traités*, 24 RECUEIL DES COURS 5 (1928); Charles Fairman, *The Interpretation of Treaties*, 20 TRANSACTIONS OF THE GROTIUS SOCIETY 123 (1935); Sir Gerald Fitzmaurice, *The Laws and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points, 1951-1954*, 33 BRIT. Y.B. INT’L L. 203 (1957); LORD ARNOLD MCNAIR, *THE LAW OF TREATIES* (1961); V.D. DEGAN, *L’INTERPRÉTATION DES ACCORDS EN DROIT INTERNATIONAL* (1963).

<sup>8</sup> *See, e.g.*, *Eastern Extension, Australasia and China Telegraph Company, Ltd. v. United States*, 6 R.I.A.A. 112, 114-15 (Nov. 9, 1923) (“International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find—exactly as in the mathematical sciences—the solution of the problem.”).

legal formalists, an approach that might be referred to as a “rule” approach.<sup>9</sup> Such lawyers may be tempted to invoke a canon of construction as though it is a straightforward, useful, and tested means of conveying a universal rule that should be automatically applied to the case at hand. For the litigator, it may help win the case; for the judge, it may help convince the parties and others that the case was decided correctly. Yet many international lawyers seem aware that approaching canons of construction as neutral rules that may be applied automatically to resolve cases is problematic, an insight that was gleaned in American jurisprudence during the rise of the legal realism movement.

### III. Utility and Limits: Legal Realism

The American legal realism movement, a form of analytical jurisprudence, emerged in the early twentieth century and rejected the core tenets of legal formalism.<sup>10</sup> With respect to adjudication, the realists doubted that judges were mechanically applying neutral rules to decide cases; while they might present a façade of doing so, in fact judges were at times deciding cases based on their own political, cultural, or moral preferences.

In this context, a famous critique of canons of construction in relation to the interpretation of statutes<sup>11</sup> was made in 1950 by Columbia University Professor Karl N. Llewellyn. For Llewellyn, litigators and judges in U.S. courts approached adjudication as though there was a single correct outcome, often invoking a canon of construction. Yet he noted that there typically could be found *two opposing canons* on almost every issue, which meant that such canons were not determinate and could be used by judges to justify outcomes that were driven by something other than neutral application of the “law”.<sup>12</sup> In support of his observation, Llewellyn extracted from U.S. cases a list of 24 canons that had been used (placed in a “thrust” column), which he then paired with a list of 24 opposite canons that also had been used (placed in a “parry” column).<sup>13</sup> For each pairing, the outcome in a case could depend simply on which canon a judge selected, rather than a mechanical application of the law.

A similar exercise might be undertaken with respect to canons of construction used for the interpretation of treaties (or unilateral declarations or reservations to treaties) in international law,<sup>14</sup> setting forth examples such as the following:

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<sup>9</sup> See MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 160-67 (1989).

<sup>10</sup> See generally AMERICAN LEGAL REALISM (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993); Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915 (2005). The movement, of course, was not unique to the United States. See, e.g., Geoffrey MacCormack, *Scandinavian Realism*, 11 JURID. REV. 33 (1970).

<sup>11</sup> Similar critiques exist with respect to the use of canons of construction in U.S. law for interpreting contracts. See, e.g., Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833 (1964).

<sup>12</sup> Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

<sup>13</sup> *Id.* at 401-06.

<sup>14</sup> This table draws upon the form of Latin expression, translation and explanations provided in AARON X. FELLMETH & MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW (2009).

<b>Thrust</b>	<b>Parry</b>
1. <i>In dubio haec legis construction quam verba ostendunt</i> (when in doubt, the construction of the law is the one that the words indicate): when the meaning or intent of a treaty is uncertain, the words should be read according to their plain meaning	1. <i>In conventionibus, contrahentium voluntas potius quam verba spectari placuit</i> (in agreements, the intentions of the parties are to be regarded more than their words): the language of a treaty that seems to disserve the intentions of the drafters should be read to conform to those intentions
2. <i>Ex abundante cautela</i> (from an abundance of caution): a seemingly redundant word may be explained as simply an excess of caution by the drafter	2. <i>Ut res magis valeat quam pereat</i> (so that the matter may flourish rather than perish) (also known as “effect utile”): an interpreter should avoid reading the treaty in a manner that would render language in the treaty redundant, void or ineffective
3. <i>Expressio unius est exclusio alterius</i> (the express statement of one is the exclusion of the other): when something is stated expressly in the treaty, any similar matter omitted from the treaty is presumed to have been omitted intentionally	3. <i>Exempla illustrant, nonrestringant, legem</i> (examples illustrate the law, they do not restrict it): in interpreting a treaty containing examples, the examples should be read to clarify the purpose and scope of the treaty, rather than to restrict its applicability only to those scenarios depicted by the examples
4. <i>Generalis regula generaliter est intelligenda</i> (a general rule is to be interpreted generally): a treaty rule of general application should be applied broadly, with the understanding that some exceptions may be justified	4. <i>Generalia specialibus non derogant</i> (general things do not derogate from specific things): specific or detailed provisions of a treaty should prevail over more general, conflicting provisions
5. <i>Contra proferentem</i> (against the offeror): Ambiguity or vagueness in the legal instrument should be construed against the interests of the drafter	5. <i>In ambiguous orationibus maxime sentential spectanda est eius qui eas protulisset</i> (in ambiguous statements, the greatest regard is for the views of the person who made them): when interpreting an ambiguous treaty provision, the opinion of the drafter on its interpretation should carry the greatest weight
6. <i>Contemporanea expositio est optima et fortissimo in lege</i> (a contemporaneous exposition is the best and strongest in the law): evidence of the intent of the drafters of the treaty at the time of its adoption is the best evidence as to the meaning of vague, ambiguous or disputed language	6. <i>Principle of evolutive treaty interpretation</i> : generic terms in long-term treaties are presumably intended to be interpreted evolutively, so as to change in meaning, even in ways not foreseen by the drafters
7. <i>In dubio mitius</i> (more leniently in case of doubt): where there is doubt about the existence of a treaty obligation, no obligation will be found to avoid limiting State sovereignty	7. <i>Benignius leges interpretandae sunt quo voluntas earum conservetur</i> (laws are to be liberally interpreted to preserve their intent)

Although Llewellyn directly challenged the ability of canons of construction to operate in a neutral way for deciding the outcome of a case, Llewellyn himself did not advise lawyers to ignore such canons completely. Rather, he accepted that when “it comes to presenting a proposed construction in court, there is an accepted conventional vocabulary,” which included the canons, and he believed that every “lawyer must be familiar with them all; they are still needed tools of

argument.”<sup>15</sup> Indeed, at their heart, such canons were shorthand for expressing a complex logical claim. For Llewellyn, canons of construction were tools of the trade; while they should not be mistaken to be trump cards that will invariably win a case, they still had a purpose. He said:

Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon: The good sense of the situation and a *simple* construction of the available language to achieve that sense, *by tenable means, out of the statutory language*.<sup>16</sup>

Even so, Llewellyn’s devastating critique “largely persuaded two generations of [U.S.] academics that the canons of construction were not to be taken seriously.”<sup>17</sup> Instead, U.S. academics (and to a certain extent the courts themselves) moved toward resolution of textual ambiguity in a statute by other means, notably through ascertaining the legislature’s intent or purpose, to be gleaned in large part from the legislative history of the statute.

A comparable phenomenon has unfolded in international law despite the considerable use of canons of construction by international courts and tribunals. In 1935, Manley O. Hudson’s project on Harvard Research in International Law published a Draft Convention on the Law of Treaties,<sup>18</sup> which proposed an article on interpretation of treaties that did not include the many canons of construction articulated by prior scholars.<sup>19</sup> Rather, the commentary inveighed strongly against the use of detailed canons of construction, at least if used as neutral, obligatory rules. Among other things, the commentary stated that it “seems evident that the prescription in advance of hard and fast rules of interpretation—even ... if they amount only to rebuttable presumptions—contains an element of danger which is to be avoided.”<sup>20</sup> While not going so far as to say “that all the so-called canons of interpretation are of absolutely no utility,” the commentary viewed treaty interpretation not as beholden to such canons, but as “a task which calls for investigation, weighing of evidence, judgment, foresight, and a nice appreciation of a number of factors varying from case to case.”<sup>21</sup>

Such thinking influenced the views of later scholars, such as Julius Stone<sup>22</sup> and Lord McNair. Indeed, McNair would state in his important 1961 treatise that “we are amongst those who are skeptical as to the value of those so-called rules and are sympathetic to the process of their gradual devaluation, of which indications exist.”<sup>23</sup> James Brierly and Sir Hersch Lauterpacht, who served as the first two rapporteurs for the International Law Commission’s

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<sup>15</sup> Llewellyn, *supra* note 12, at 401.

<sup>16</sup> *Id.* (emphasis in the original).

<sup>17</sup> John F. Manning, *Legal Realism and the Canons’ Revival*, 5 GREEN BAG 283, 283 (2002).

<sup>18</sup> Research in International Law, Harvard Law School, *Draft Convention on the Law of Treaties*, 29 AM. J. INT’L L. SUPP. 653 (1935).

<sup>19</sup> *Id.* at 937, Art. 19; see also RICHARD GARDINER, *TREATY INTERPRETATION* 64 (2d ed. 2015) (“[A]lthough listing twelve from the many publicists who have drawn up sets of canons, rules or maxims from Grotius (1625) to Ehrlich (1928), and noting the use made of these by arbitral tribunals and the PCIJ, despite all this volume of doctrine, the commentary to the Harvard draft saw the modern trend as being to reduce rather than expand the number of rules.”).

<sup>20</sup> Draft Convention on the Law of Treaties, *supra* note 18, at 946.

<sup>21</sup> *Id.* at 946-47.

<sup>22</sup> Julius Stone, *Fictional Elements in Treaty Interpretation—A Study in the International Judicial Process*, 1 SYDNEY L. REV. 344, 364 (1955).

<sup>23</sup> Lord McNair, *supra* note 7, at 366.

(ILC) project on the law of treaties, also expressed skepticism about the canons of construction as “rules” of international law for interpreting treaties.<sup>24</sup>

By contrast, Sir Gerald Fitzmaurice, who served as the ILC’s third special rapporteur, recognized the problem, but in a 1957 article<sup>25</sup> sought to differentiate between general “principles” of treaty interpretation, which had an obligatory character and which could be codified, from other non-obligatory canons of construction. The same approach had been taken by the Institute of International Law in 1956.<sup>26</sup> The ILC’s fourth and final special rapporteur on the topic, Sir Humphrey Waldock, also acknowledged the difficulty of imposing detailed rules on the interpretive process and cited, *inter alia*, to the Harvard commentary to make that point.<sup>27</sup> Even so, he found that not only are the “great majority of cases submitted to international adjudication involves the interpretation of treaties,” but that “the jurisprudence of international tribunals is rich in references to principles and maxims of interpretation.”<sup>28</sup> Indeed, he maintained that “statements can be found in the decisions of international tribunals to support the use of almost every principle or maxim of which use is made in national systems of law in the interpretation of statutes and contracts ...”.<sup>29</sup>

In light of this assessment, Waldock proposed that the Commission “seek to isolate and to codify the comparatively few rules which appear to be “obligatory” for the interpretation of treaties.”<sup>30</sup> Thus, a rule that calls for the interpretation of a treaty provision to begin with its literal words, and to give those words their usual or ordinary meaning, is obligatory in nature, as are others, such as those that call for construing the provision in context and in light of the treaty’s object and purpose. But other “maxims and principles” (i.e., canons of construction), which possess a “non-obligatory character”<sup>31</sup>, should not be codified “as there would be a danger that the inadvertent omission of a principle from the list might be thought to throw doubt upon its status even as a subsidiary aid to the interpretation of treaties.”<sup>32</sup>

Consequently, as discussed in chapter 1 of this volume, Waldock proposed and the ILC codified certain general canons of construction in what became Articles 31-32 of the Vienna Convention on the Law of Treaties,<sup>33</sup> drawing in particular upon the 1956 resolution of the Institute of International Law and Fitzmaurice’s 1957 article.<sup>34</sup> These “canons”, however,

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<sup>24</sup> See Hersch Lauterpacht, *Interprétation de l’traits: Rapport à l’Institut de droit international*, 43(I) ANNUAIRE DE L’INSTITUT 336, 336-74 (1950); J.L. BRIERLY, *LAW OF NATIONS* 325 (6th ed. 1963).

<sup>25</sup> Fitzmaurice, *supra* note 7.

<sup>26</sup> Institut de Droit International, *Interprétation de Traités* (April 19, 1956).

<sup>27</sup> *Third Report on the Law of Treaties* (Sir Humphrey Waldock, special rapporteur), [1964] 2 Y.B. Int’l L. Comm’n 53, para. (1).

<sup>28</sup> *Id.* at 54, para. (5).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, para. (8).

<sup>31</sup> *Id.*, para. (6).

<sup>32</sup> *Id.*, para. (8).

<sup>33</sup> Vienna Convention on the Law of Treaties arts. 31-32, May 23, 1969, 1155 U.N.T.S. 331.

<sup>34</sup> *Third Report on the Law of Treaties* (Sir Humphrey Waldock, special rapporteur), *supra* note 27, at 55-56, paras. (10)-(12).

operate at a very general level, and may be understood as mediating without favoritism<sup>35</sup> among the three main schools of treaty interpretation: the “textual” approach; the “intention of the parties” approach; and the “object and purpose” approach.

What the ILC did not do was to go further, listing out the more specific canons of construction that had been used at one time or another by international courts and tribunals when interpreting treaties. Although the Commission was aware of such usage, it followed Waldock’s view that such “principles and maxims” were not obligatory in character, but rather simply served as guides for the interpreter, ones that might be relevant in a given situation.<sup>36</sup> The Commission’s commentary stated that such canons of construction

are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties have intended to attach to the expressions that they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document; the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up, etc. Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that is appropriate in the particular circumstances to the case. In other words, recourse to many of these principles is discretionary rather than obligatory and the interpretation of documents is to some extent an art, not an exact science.

Any attempt to codify the conditions of the application of those principles of interpretation whose appropriateness in any given case depends on the particular context and on a subjective appreciation of varying circumstances would clearly be inadvisable. Accordingly, the Commission confined itself to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties.<sup>37</sup>

At the same time, the ILC left open the door for the use of other canons of construction as supplementary means of interpretation, falling within the broad terms of Vienna Convention Article 32.<sup>38</sup>

Thus, like Llewellyn, the ILC viewed the more detailed canons of construction as having value as a “guide” to treaty interpretation, but believed they had to be applied in context, and they were not obligatory in nature. Unlike Llewellyn, the ILC did not highlight the ability to play canons of construction off one another, nor did it suggest that their indeterminacy allowed

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<sup>35</sup> Draft Articles on the Law of Treaties, commentary to Articles 27-28, [1966] 2 Y.B. Int’l L. Comm’n 187, 219-20, para. (8) (“All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation.”).

<sup>36</sup> Richard Gardiner, *The Vienna Convention Rules on Treaty Interpretation*, in *THE OXFORD GUIDE TO TREATIES* 475, 477 (Duncan Hollis ed., 2012) (“It is clear that the ILC’s approach was not to exclude such principles and maxims, but to concentrate on the minimum necessary to stand as rules.”).

<sup>37</sup> *Draft Articles on the Law of Treaties*, *supra* note 35, at 218, paras. (4)-(5).

<sup>38</sup> ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 220-21 (3d ed. 2013).



international judges to dress their decision-making in purportedly neutral clothes, thereby masking the true reasons for reaching a particular outcome. Even so, the possibility of competing canons being invoked has arisen in international adjudication,<sup>39</sup> and academics have certainly charged that the use of canons provides judges a largely unconstrained ability to decide cases in accordance with their own preferences.<sup>40</sup>

#### IV. Utility and Limits: Modern Legal Textualism and Pragmatism

Arguably international litigators and judges rely on canons of construction to a much lesser degree than they might because of the concern that motivated Llewellyn's analysis and that prompted the ILC to refrain from explicitly incorporating such canons into what became the Vienna Convention on the Law of Treaties. Given that canons of construction, if presented as a legal "rule" that dictates the outcome in a case, are susceptible to criticism of the type leveled by Llewellyn, then maybe caution is being exercised with respect to their use. If an empirical study were undertaken regarding the use of such canons in the judgments of international courts and tribunals, it would likely find that canons of construction are used, but not in a habitual, systematic manner, and are certainly far less used than the rules expressly articulated in Articles 31-32 of the Vienna Convention on the Law of Treaties.

Yet canons of construction *are* invoked at times by international litigators and judges, as demonstrated in the other chapters of this volume, and it is worth considering why that is the case. Here, too, perhaps recent developments in American jurisprudence provide some insights for the international realm. As recounted by John Manning, by the mid-1980s in the United States, heavy reliance on legislative history (rather than on canons of construction) for interpreting an ambiguous statute came under strong attack, both in scholarly circles and in the courts.<sup>41</sup>

"Modern legal textualists", such as the late U.S. Supreme Court Justice Antonin Scalia,<sup>42</sup> reject the ability of judges to ascertain the "actual" intent or purpose of the legislature by analyzing legislative history, finding such history far too complex, conflicting, and incomplete. Indeed, modern textualists generally doubt the existence of such a collective legislative intent, doubt that legislators necessarily agree with the contents of legislative history, and doubt that purposes expressed at a general level in such history can really govern the specific rules actually enacted into law.<sup>43</sup> Instead, modern textualists believe that the text of a statute is best interpreted through an understanding of the prevailing interpretive conventions or usages of the community

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<sup>39</sup> For example, in the Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. Rep. 174, the majority used the intentions of the drafting parties of the United Nations Charter to create an implied power of the United Nations to present a claim on behalf of the victim, while Judge Hackworth argued that implied powers had to be grounded in the text of an instrument when he emphasized that "[p]owers not expressed cannot be freely implied."

<sup>40</sup> For an argument to that effect, see Vitalius Tumonis, *Judicial Creativity and Constraint of Legal Rules: Dueling Canons of International Law*, 20 UNIV. MIAMI INT'L & COMP. L. REV. 93, 119 (2012).

<sup>41</sup> Manning, *supra* note 17, at 289.

<sup>42</sup> See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 26 (1997) (finding that many canons of construction are "so commonsensical that, were [they] not couched in Latin, you would find it hard to believe that anyone could criticize them"). For an account of the movement (and its possible overreach), see Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006).

<sup>43</sup> Manning, *supra* note 17, at 290.

within which legislators and judges operate, which can lead one to an “objectified” intent.<sup>44</sup> That, in turn, calls for reliance on canons of construction, for “textualists deem it essential to foster clear and predicable linguistic and syntactic rules to permit legislators and interpreters to decode enacted texts.”<sup>45</sup>

Using canons of construction when interpreting treaties may be attractive for similar reasons. While the Vienna Convention contemplates using the “legislative history” of the treaty – i.e., the preparatory work of the treaty or *travaux préparatoires* – the difficulty in doing so, especially for multilateral treaties that entailed a constellation of States and their officials engaged in years of sometimes complex negotiations, is well known. Further, if the views “legislators” – i.e., States and sometimes international organizations – present at the time the treaty was negotiated are different from the parties to the treaty at a later time, due to new accessions to the treaty, then it becomes necessary to assume that the acceding party is familiar with and consents to the *travaux préparatoires*. Rather than rely on such information for clarifying the meaning of an ambiguous provision of a treaty, perhaps canons of construction are an attractive means of gleaning what States likely meant in crafting and agreeing to a treaty provision, on an assumption that the canons are well-known and understood within the international legal community.

“Modern legal pragmatism” in the United States<sup>46</sup> also has fostered a turn to the use of canons of construction. While pragmatists such as Professor Cass Sunstein<sup>47</sup> share with textualists a skepticism of legislative history, they reject an effort to ascertain an “objectified” intent of the legislators to resolve ambiguity. Rather, in the face of an ambiguous statute, the legal pragmatist turns to canons of construction as default rules that promote certain goals of the legal system,<sup>48</sup> such as the protection of federalism or the interests of disadvantaged groups.<sup>49</sup> Likewise, perhaps canons of construction when interpreting treaties are attractive if they assist in establishing default rules that promote goals of the international legal system. Certainly, a canon such as *in dubio mitius* seems designed to help remind the interpreter that, where there is doubt about the existence of a treaty obligation, a reason not to find the obligation is the desire to respect the sovereignty of States, a structural feature of the system of international law.

Yet Llewelyn’s basic criticism remains; there is a problem with using canons of interpretation – either as a set of linguistic and syntactic rules common to international “legislators” or as default rules to be applied in support of the goals of the international legal system – if those canons are indeterminate and susceptible to being used to argue conflicting positions. The path now being taken in American jurisprudence is to develop theories for making canons of construction more consistent, useful, and legitimate, such as identifying when it is that a judge will invoke a canon at all,<sup>50</sup> and indicating under what circumstances a particular canon

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<sup>44</sup> *Id.* at 291.

<sup>45</sup> *Id.* at 292.

<sup>46</sup> See, e.g., M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373 (1985); Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179 (1990).

<sup>47</sup> Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

<sup>48</sup> Manning, *supra* note 17, at 290.

<sup>49</sup> See Sunstein, *supra* note X, at 468-93.

<sup>50</sup> Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 648-56 (1992).

should or should not be used.<sup>51</sup> In due course, perhaps a similar path will be taken in international legal scholarship on the interpretation of treaties, drawing upon the lessons learned from national jurisprudence<sup>52</sup> as well as cross-disciplinary studies.<sup>53</sup>

## V. Conclusions about the Utility and Limits of Canons of Construction

What conclusions might be drawn from the points discussed above? As a general matter, there are certain obligatory canons of construction that have been expressly incorporated in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. These canons are essential elements of the interpretive process; while in any given context, one or the other of these elements might be favored, they are all to be “thrown into the crucible”<sup>54</sup> in order to arrive at a proper interpretation.

By contrast, other canons of construction, of the type focused upon in this volume, are regarded as less essential to the interpretive process, and hence of more limited value. They certainly should not be approached as providing a mechanical or decisive means for resolving cases, given the likely ability to pair any given canon with another canon that calls for a different outcome. Indeed, the invocation of a canon as requiring a particular outcome may be an attempt to mask with legal jargon the interpreter’s own policy preference. Even when invoked simply as an interpretive aide, such canons must be used with caution, taking full account of the context at issue. Over time, perhaps there will develop within international law a better understanding (if not theory) for when it is that such canons should be employed, making their use more consistent and legitimate.

In the meantime, such canons have been found useful in international discourse, and hence are referred to and relied upon. A canon might provide assistance to an interpreter as a non-obligatory guide for how best to approach analyzing certain elements of Vienna Convention Article 31, such as the context of a treaty provision.<sup>55</sup> If application of the elements of Article 31 have led to an interpretive outcome that is problematic, a canon might provide an alternative path of reasoning, of the kind envisaged in Article 32, perhaps by suggesting a general approach for harmonizing the diverse system of international law. Indeed, since the canons might be viewed as expressing an interpretive code understood within the international legal community, a canon might help in divining what was likely intended by the drafters of the treaty. In any event, at a minimum, a canon can serve as one tool in the lawyer’s toolkit, providing a simple way of expressing a complex logical claim, even if susceptible to rebuttal by an opposing logical claim.

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<sup>51</sup> See Manning, *supra* note 17, at 294-95.

<sup>52</sup> See, e.g., Alex Glashausser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73 U. CIN. L. REV. 1243, 1307-21 (2005).

<sup>53</sup> See, e.g., Jennifer Smolka & Benedikt Pirker, *International Law and Pragmatics — An Account of Interpretation in International Law*, 5 INT’L J. LANGUAGE & L. 1 (2016) (finding that “recent research in linguistics and pragmatics, and the concepts that such research has provided, may ... help us to build a stronger scientific foundation for the debate within international law on interpretation.”).

<sup>54</sup> Draft Articles on the Law of Treaties, commentary to Articles 27-28, [1966] 2 Y.B. Int’l L. Comm’n 187, 220, para. (8).

<sup>55</sup> Gardiner, *The Vienna Convention Rules on Treaty Interpretation*, *supra* note 36, at 504 (finding the canons to be “a means of analysing the context when applying the first part of the general rule” set out in Vienna Convention Article 31”).